to a choice between the evil of mere collateral inconvenience and that of depriving one on trial for a capital offense, whose chief defense is necessarily provable only by circumstantial evidence, of the strongest circumstance sustaining that defense, it is hard to see how a court of justice can have the least hesitation in deciding which is the greater evil.

PRESUMPTION OF THE TIME OF THE DEATH OF ONE PRESUMED TO BE DEAD AFTER ABSENCE OF SEVEN YEARS.—At what time death is legally presumed to have occurred, as is true in many questions of evidence, has produced irreconcilable and acknowledged conflict among the authorities. The English courts with their customary consistency and conservatism have adopted one rule which is followed in America by some cases. On the other hand at least two other extreme and opposite doctrines encumber the American courts. The whole doctrine of presuming one dead after a continued absence unheard of for seven years, arose from two early Acts of Parliament; the first (1603) [1] provided an exemption from prosecution for bigamy to one who married a second time, his or her spouse having been absent for seven years; the second (1667) [2] enacted that in regard to certain titles to land one should be accounted dead who had been absent for a like period. By analogy drawn from these statutes the presumption of death has been applied in all cases both civil and criminal to such an extent, that for a long time it has been regarded as a fundamental principle of the common law, though in many states it is specifically covered by statute.[3]

Early cases in England said that a person once shown to be living was by law presumed to continue so until his death was proved or overcome by the conflicting presumption of death after an absence of seven years. At the expiration of this period a presumption of law arises that the person is dead but none as to the time at which death actually occurred and one whose right of recovery depends upon the establishment of death at, prior to, or subsequent to a particular time, must do so by evidence of some sort.[4] In other words it was established as law: First, that the law presumes a person who has not been heard of for seven years to be dead, but in the absence of special circumstances draws no presumption from that fact as to the particular period at which he died. Secondly, that a person alive at a certain period of time is to be presumed to be alive at the expiration of any reasonable period afterwards.

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[1] 1 Jac. I, c. 11, s. 2. [2] 19 Car. 2, c. 6.

[3] The statutory period in some states is fixed for a less time than seven years. See People *v.* Feilen, 58 Cal. 224. While if there is no period fixed by statute the court will adopt the period assumed by the English judges, viz., seven years. Burr *v.* Sim, 4 Whart. (Pa.), 150, 33 Am. Dec. 50. Fixed by statute in Virginia. Evans *v.* Stewart, 81 Va. 724.

[4] Doe ex. dem. Knight *v.* Nepean, 5 Barn. & Ad. 86, 27 C. L. R. 42; Nepean *v.* Knight, 2 Mess. & W. 984, 8 Eng. Rul. Cas. 512.

And, thirdly, that the *onus* of proving death at any particular period within the seven years lies with the party alleging death at such particular time.[5]

The doctrine that there is a legal presumption of the continuance of life when it is once shown to exist was later abolished and now the settled law in England is, that one who founds a right upon a person having survived, or upon a person having predeceased a particular date, must establish that fact affirmatively by evidence.[6] Many American courts, including the Supreme Court of the United States, have adopted the English view, that there is no presumption of law as to the time at which death took place and the burden of proving its occurrence at any particular time within the seven years lies upon the person claiming a right to the establishment of which that fact is essential. "If any one has to establish the precise period during those seven years at which such person died, he must do so by evidence and can neither rely, on the one hand, upon the presumption of death, nor, on the other, upon the presumption of the continuance of life." [7] The time of death is a matter of fact to be determined by a jury by means of inferences drawn from the surrounding facts and circumstances shown in the evidence, and for this purpose they may take into consideration the age, health, domestic relations, the nature and object of the journey embarked upon, etc., of the supposed deceased, but there is no legal presumption of death at any specific time.[8]

On the other hand, perhaps the majority of American cases have adopted the principle that, in the absence of circumstances from which the precise time of death may be inferred, the presumption of death can not act retrospectively, and that therefore the person whose death is in question will be taken to have lived during the whole of the period and to have died at its expiration.[9]

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[5] Lambe *v.* Orton, 6 Jur. (N. S.) 61; Dunn *v.* Snowden, 2 Dr. & Sm. 201; Thomas *v.* Thomas, 2 Dr. & Sm. 298; In re Benham's Trust, Law. Rep. 4 Eq. 416, 419.

[6] In re Phene's Trust, Law Rep. 5 Ch. 139; Re Aldersey (1905) 2 Ch. 181; Re Walker, L. R. 7 Ch. 120; Rex *v.* Inhabitants of Harbourne, 2 Ad. & E. 540; Reg. *v.* Lumley, Law Rep. 1 C. C. 196.

[7] Davie *v.* Briggs, 97 U. S. 628, 634; Bradley *v.* Modern Woodmen of America, 146 Mo. App. 428, 124 S. W. 69; Spahr *v.* Mutual Life Ins. Co. of New York, 98 Minn. 471, 108 N. W. 4; Evans *v.* Stewart et al., 81 Va. 724. See 1 Taylor, Treatise on Law of Evidence, § 157; People *v.* Feilen, 58 Cal. 224.

[8] Bradley *v.* Moden Woodmen of America, *supra;* Spahr *v.* Mutual Life Ins. Co. of New York, *supra;* Butler *v.* Supreme Court, I. O. O. F., 53 Wash. 118, 101 Pac. 481.

[9] Montgomery *v.* Bevans, 1 Sawy. 653, 4 Am. Law. T. Rep. U. S. Cts. 202, 17 Fed. Cas. 628, Fed. Cas. No. 9735. In spite of the emphatic and unequivocal language in which this case states the law as above, it is but dicta, for by inference from the facts and circumstances, it was actually adjudged that death occurred within a few days after the departure of the deceased. This case has evidently been overruled by the United States Supreme Court in Davie *v.* Briggs, *supra,* where possibly by mistake it is cited as authority for the opposite doctrine. Further this case is criticised by the Supreme Court of the state in

Possibly this doctrine possesses some practical advantages impossible under the English view. It is doubtless more convenient—an exceedingly persuasive factor with an overworked court—and cases may arise in which, under the English view, the property in dispute must remain undistributed, or be distributed among the contestants not according to any settled principle, but according as upon whom lies the burden of proof, i. e., as one or the other happens to be the moving party in court.[10] Again when the title to property depends directly upon the death of the absentee on some specific day, an arbitrary rule for quieting the title, from the very nature of the case, is impossible under the English doctrine.[11] Such legal uncertainty is open to criticism and should be eliminated unless it entails too great a sacrifice of reason and justice.

It is submitted that the fallacy in this doctrine lies in legally presuming a continuance of life from its shown existence at any given time. If there is a legal presumption of the continuance of life of the absentee for the first day after his departure then such presumption must exist with equal force for every day of the entire period. At the expiration of the seven years the presumption of the fact of death arises, but up until the last day there is a presumption that such person is alive. Therefore, it necessarily follows, if there is on next to the last day of the period a legal presumption of life and one day later a legal presumption of death the law must presume death to have taken place in the interim, i. e., on the last day.[12] If the law presumes life on one day and a day later presumes death the transition must also be presumed to have occurred during the intervening time. It seems logically impossible to presume a continuance of life without also presuming that death took place on the last day and some courts have so held.[13] Other cases, though

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which the federal court sat, in People *v.* Feilen, *supra.* Burr *v.* Sim, 4 Whart. (Pa.) 150, 33 Am. Dec. 50; Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248; Murphy *v.* Metropolitan Life Ins. Co. (Jan. 1916), 155 N. Y. Supp. 1062.

[10] See Montgomery *v.* Bevans, *supra.*

[11] Such a situation might arise in the case of ascertaining the wife's dower, and no certain date could be fixed upon, from which her title would date, for if there was any proof of death on a particular day the presumption of death would no longer be applicable.

[12] It might logically be deduced that death occurred on the last infinitely minute division of time of the last day, but such a practically confusing result is prevented by the familiar maxim, "The law knows no fraction of a day."

[13] Burr *v.* Sim, *supra;* Whiting *v.* Nicholl, 46 Ill. 230, 92 Am. Dec. 248. "As held by the courts of this country the doctrine is, that a person once found to be alive is presumed to continue to live until there is proof of the contrary. At the end of seven years from the time he was last heard of, the presumptions of life ceases and the opposite presumption of death takes its place. The legal presumption * * * establishes not only the fact of death, but also the time at which the person shall first be accounted dead," says the court in Montgomery *v.* Bevans, *supra.* Clark *v.* Canfield, 15 N. J. Eq. 119; Eagle *v.* Emmet, 4 Bradf. (N. Y.) 124. See In re Phene's Trusts; Note, 26 L. R. R. (N. S.) 294 for a collection of the authorities.

emphatic as regards the continuance of life, leave it extremely difficult, if not impossible, to determine whether or not there is a presumption of death on the last day, by the use of such language as, "while, therefore, it is true that there is no presumptive that death occurred at any particular time within the seven years, it is also true that * * * it will be presumed that life continued during the entire period." [14] If it is meant by these cases that there is a presumption of a continuance of life during the entire period but none at all as to the time of death they are clearly erroneous.[15] Though there is a presumption of a continuance of life, under this doctrine, it is of course only prima facie and may be rebutted by circumstantial evidence of death before the end of the seven years, such as the age, habits, domestic relations, etc., of the supposed decedent.[16]

Moreover by this ruling the courts are inevitably forced to the almost absurd conclusion that the law presumes death to have occurred on the last day of the seven years. Such a presumption could hardly be further from the real facts, for of all the points of time, the last day is the most improbable and most inconsistent with the ground of presuming the fact of death. A presumption is a fixed consequence annexed by law to known facts, based on the laws of nature or by common experience almost universally found to exist.[17] But here we have a legal presumption absolutely contrary to common experience. Realizing this, it is justified by some authorities as being an artificial as distinguished from a natural presumption, being merely a rule of law established for the sake of convenience and certainty irrespective of the probability that it corresponds with the truth.[18] The application of this so-called artificial presumption, which is in effect but a substantive rule of law created by judicial legislation, seems unjustified in the subject under consideration. It is true that the period itself is an arbitrary one, but the presumptions of death itself is, as all other true presumptions are based on the probabilities of truth. It is founded on the ordinary course of events since it is considered extraordinary if the absentee were alive that he should not return or be heard from, and the presumption arises purely by reason of the elapse of a considerable time. So the presumption is a natural one though the exact period may be arbitrary.

Further, as was so ably said by Lord Denman, in *Nepean* v. *Knight,* and quoted with approval by other courts: [19] "When noth-

[14] Reedy *v.* Milizen, 155 Ill. 636, 40 N. E. 1028; Schaub *v.* Griffin, 64 Md. 557, 36 Atl. 443. See Chapman *v.* Cooper, 5 Rich. L. (S. C.) 452; Hancock *v.* American Life Ins. Co., 62 Mo. 26.

[15] This was said in Doe ex dem. Knight *v.* Nepean, *supra*, but criticised and overruled in In re Phene's Trusts, *supra.*

[16] Reedy *v.* Millizen, *supra;* Johnson *v.* Johnson, 11, Ill. 611, 3 N. E. 232.

[17] See Gr. §§ 14, 33.

[18] Burr *v.* Sim, *supra.*

[19] This is the case in Virginia. The English doctrine is settled by a case squarely presenting the question. Evans *v.* Stewart, 81 Va. 724, 738.

ing is heard of the person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one for the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years."

When a person leaves home and is unheard of, there is for a time a just inference that he is alive, dependent absolutely in strength and duration upon the concomitant facts and circumstances. If the person is young and the contemplated journey a reasonably safe one according to common experience, the inference would be stronger and of greater duration than when just the opposite conditions exist. As time passes the inference of the continuance of life grows weaker in probative force by reason of the length of time which has elapsed, and the logical adverse inference has *pari passu* been growing that the person in question is dead. Presently a point of time is reached at which the evidentiary power of the inference of death will overcome that of the continuance of life. Then later still a second point of time is certain to arrive at which the inference of death has so completely overcome the inference of a continuance of life as to be *prima facie* valid. At this point the inference of death might rightly be designated a presumption of law, but it would be logically impossible to determine in any particular case when such a point was reached. This point, more or less arbitrarily, yet ultimately founded on common human experience, by statute, or in analogy to a statute, by the courts, is fixed at seven years as determining the commencement of a *prima facie* legal presumption of the fact of death.[20] To say, however, that there is a legal presumption of life until the expiration of the period, as many of the courts have held, seems contrary to reason. As a rule of law a legal presumption can take no cognizance of the circumstances of the particular case and is of equal force on the last day as the first, whereas, if it is a mere inference, or presumption of fact so-called, it may be considered by the jury in the light of the surrounding facts and circumstances as an inference of varying probative force. It is to be regretted that the language of the courts

[20] 2 Cham. on Ev., §§ 1092, 1112.

will not permit a firm conviction that they observe this distinction between inference of fact and presumption of law.

After all it may be reasonably doubted if this doctrine produces any great certainty. To fix the time of death at the end of seven years can only make it certain for cases determining a right arising after the expiration of such time. So far as concerns rights dependent upon life or death at any time before the end of the period, and perhaps ninety per cent of the cases are of this nature, no greater certainty is derived by presuming the time of death as at the end of the period than if there was no such presumption or of the continuance of life. Nor can it hardly be said that the ends of justice are greatly furthered by the existence of a legal presumption of life in favor of him whose right or title depends upon it at any particular time and against him whose equal right depends upon death at the same time. The probabilities of the actual facts are no greater in favor of life or death so why does justice demand a legal presumption one way or the other?

The courts find themselves in quite an embarrassing position when the legal presumption of a continuance of life is urged in a criminal prosecution for bigamy where the second marriage takes place before the expiration of the seven years. None of them seem to go so far as to maintain that such cases present a pure exception to the doctrine but rather that it is rebutted by the conflicting presumption of innocence.

A presumption of innocence in bigamy is identical in effect to the same presumption in all other criminal prosecutions, viz., it imposes upon the state the burden of proving every element of the crime beyond a reasonable doubt. The element of bigamy under consideration is the life of the first consort at the time of the second marriage and this must be proved as any other element. But does not the prosecution have as its aid the legal presumption of a continuance of life for seven years? The authorities emphatically hold that there is no such presumption, [21] or that it is overcome by that of innocence, [22] others that it is neutralized, leaving the question to the jury as a naked matter of fact divested of any presumption of law, [23] though there may be an inference of fact.[24] Now why the presumption in one case and not in the other? Two cases arise involving the death of the same person prior or subsequent to a certain time one, in regard to the title to property, the other a prosecution for bigamy. In the first the plaintiff wins because there is a presumption of a continuance of life, in the second the defendant wins because there is no such presumption. Can it be that the law so vitally distinguishes civil and criminal cases as to allow

[21] Reg. *v.* Lumley, Law. Rep. 1 C. C. 196.
[22] People *v.* Feilen, 58 Cal. 218; Johnson *v.* Johnson, 114 Ill. 611, 3 N. E. 232.
[23] See Bishop on Stat. Crimes, § 611; Squire *v.* The State, 46 Ind. 459.
[24] Rex *v.* Harbourne, 2 Ad. & E. 540.

in no case a legal presumption in favor of the prosecution? The presumption of chastity and sanity force a negative answer.[25] It seems that the courts which find themselves in this unenviable dilemma might for the sake of consistency hold that the presumption of life does exist in favor of the prosecution but that such falls short of proof beyond a reasonable doubt, and thus virtually accomplish the same result, but no case seems to have so held.

Again how can a presumption of innocence, which merely puts the burden of proving life beyond a reasonable doubt on the prosecution, overcome a rule of law, viz., the presumption of the continuance of life? Upon analysis the two are no more diametrically opposed than any other proof of guilt by the prosecution is to the presumption of innocence. The presumption of life as a rule of law is in practical effect a part of the prosecution's proof. Why should a presumption of innocence overcome this any more than any other part of the evidence? The presumption of innocence goes to the weight and sufficiency of the evidence but it can not be used to abolish and render absolutely ineffectual any particular rule of law. The only presumption which can overcome that of life is a presumption of death, so in order to give this effect to the presumption of innocence the presumption of death which arises at the end of the seven year period must be retrospective and preexist in effect the second marriage of the defendant. But such as above shown is contrary to the decisions of this line of authorities, which hold that the law presumes death to have occurred at the end of the period. It is true that there is a fundamental distinction between the sufficiency of the evidence in criminal and civil cases, and the jury may be more ready to draw an inference in a civil action, but it can not be that the rules of evidence are so different as to sanction a positive legal presumption in the one case and none in the other.[26]

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[25] See 3 VA. LAW REV. 25.

[26] When the question arose in bigamy cases in England it was held that there was no legal presumption of a continuance of life but purely a question of fact with the burden on the prosecution. Rex *v.* Twyning, 2 B. & Ald. 386; Rex *v.* Harbourne, 2 Ad. & E. 540; Reg. *v.* Lumley, 1 C. C. 196. In the last case the court, on page 198, said: "It is incumbent on the prosecution to prove to the satisfaction of the jury that the husband or wife, as the case may be, was alive at the date of the second marriage. That is purely a question of fact. The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date." Then in the great case of In re Phene's Trust, *supra*, where the question arose in a civil action, the court recognized the unreasonable inconsistency and abolished it in these words, "True it is that Reg. *v.* Lumley was a criminal case, and that the seven years had not elapsed from the date of the first husband having been last heard of; but though a jury might be more ready to draw an inference in a civil than in a criminal proceeding, it can not be that the rules of evidence in each should be so far different as that there should be a positive legal presumption in the one proceeding, and no legal presumption in the other. A prosecutor and a person seeking to recover property, each have to prove their case,

The English doctrine as adopted by many of the American courts, viz., that there is no presumption of life or of the time at which death occurred is believed to be the soundest on principle, reason, and justice. Whatever may be said against it on the ground of uncertainty, it can not be truthfully damned with the legal stigma of inconsistency.

Some cases seem to support an extreme opposite doctrine that the presumption of death from absence raises the further presumption that the party died about the time he disappeared.[27] Even if this doctrine was advanced as a strict legal presumption it would seem to be based on sounder reason than the preceding; however it is believed that a close examination of the cases will reveal that the conclusion arrived at was more an inference of fact justified by the circumstances and conditions of the particular case, than a legal presumption.

LIABILITY OF COMMON CARRIER FOR DESTRUCTION OF GOODS BY AN ACT OF GOD TO WHICH THEY WERE EXPOSED BY THE CARRIER'S NEGLIGENT DELAY.—By the common law the common carrier is, with certain exceptions, an insurer of the goods intrusted to him.[1] But a well known exception to this rule is that a carrier is not liable if the loss is occasioned by an act of God.[2] In order for a carrier to claim this exoneration he must himself use reasonable care either to avoid such peril or to minimize the loss after the goods are actually exposed to the peril.[3] The carrier thus being liable for any negligent and unreasonable delay and not being liable for loss occasioned by an act of God, there arises the question of the carrier's liability for loss or damages due to an act of God, to which the goods would not have been exposed save for the carrier's negligent and unreasonable delay. Upon this question the authorities are about evenly divided.

The first guiding decision on this subject was the Pennsylvania case of *Morrison* v. *Davis*.[4] Here goods were shipped on a canal boat which having been delayed because of a lame horse was wrecked by an extraordinary flood which it would have escaped had it not been for such delay, and it was held that the act of God excused the carrier from liability. The main reason upon which this decision is based is that one is liable only for losses due to direct and proximate causes and not for those due to remote and consequential

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and in each instance the object is to arrive at and act on the real truth. * * * The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence."

[27] Naisor *v.* Brockway, Rich Eq. Cas. (S. C.) 449; Canady *v.* George, 6 Rich. Eq. (S. C.) 103. See also, Stevens *v.* McNamara, 36 Me. 176, 58 Am. Dec. 740.

[1] Hollister *v.* Nowlen, 19 Wend. (N. Y.) 234, 32 Am. Dec. 455.

[2] Long *v.* Pennsylvania Ry. Co., 147 Pa. 343, 23 Atl. 459.

[3] Michaels *v.* New York, etc., R. Co., 30 N. Y. 564, 30 Am. Dec. 415.

[4] 20 Pa. St. 171, 57 Am. Dec. 695.